No. 2924.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ISABELLE GARWOOD,
Plaintiff in Error,

vs.

JOSEPH SCHEIBER and MORRIS SCHEIBER and JOHN SCHEIBER,
Defendants in Error.

REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

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By....., Deputy Clerk.

Rincon Pub. Co., 689 Stevenson St., S. F.

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Counsel argues that the sale was in gross. In our first brief, under the heading "Argument on Proposition that Sale was by the Acre and Not in Gross," it is clearly shown that the presumption is always against a sale in gross, and that this presumption can be overcome only by the strongest and clearest proof. The only thing in the record which defendants can use to make the argument that the sale was in gross is the testimony of the defendants where they claim that they told the plaintiff that "the deed calls for 600 acres more or less." That testimony is denied by the plaintiff. But assume it to be true, can they hide behind such a statement when they positively knew that there were only 450 acres of usable land to the tract, and they

knew that the plaintiff was going away with the impression that she was getting 600 acres of good land? By the testimony of Jones on page 86 of the Transcript, "450.365 acres is the net amount of land that can be used for agricultural purposes. This fact is nowhere denied. Defendants themselves do not claim that plaintiff received any more than 450 acres of usable land. By the testimony of Wessing, page 311, and Joseph Scheiber on page 397, all land outside of the levee is useless for any agricultural purpose. By the testimony of Joseph Scheiber, on page 394, the defendants knew that this large percentage of land had been lost, and that the tract no longer contained the 600 acres which the "old deed called for." By the testimony of Morris Scheiber, on page 363, they bought the tract for $27,000.00; 450 goes into 27,000 just 60 times. 450 acres of usable land at $60.00 an acre. By the testimony of Joseph Scheiber, on pages 394 and 395, and also by the testimony of Morris Scheiber on page 359, defendants knew that plaintiff was ignorant of the fact that there was about 90 acres of useless land outside the levee, and was ignorant of the fact that there was 70 acres actually under the Feather River. The land was at all times represented to the plaintiff by the agents as being 600 acres of alfalfa land—level—sub-irrigated—and *free from overflow*. By the law as cited in our first brief, the defendants are charged with those statements made by the agents; and, under these facts, the defendants, if they told plaintiff, as they say, that "the deed calls for 600 acres more or less," deliberately allowed plain-

tiff to go away with a wrong understanding of the condition and quantity of the land. The plaintiff was relying, as she had a right to rely, upon the representations of the agents; and she can not be charged with any fault; and this is true even though we forget that she was a person of no experience, and also forget that her confidential agent was bribed. By the law as cited in our first brief, the defendants themselves should have called all parties together and asked them just what representations had been made, and they should have then explained fully to the plaintiff the exact condition of the land. After aiding and abetting the wrong of the agents, and deliberately and knowingly allowing the plaintiff to go away with the wrong idea which they knew that she had, will they be allowed to avoid the consequences of their wrong by calling this a contract of hazard, and saying that the plaintiff took the land on a gamble? Of course it makes no difference one way or the other, but we are of the opinion that the agents were entirely ignorant of the quantity of land outside the levee. The data which they inserted in their printed circular they certainly got from the defendants, and they would certainly have no reason to print anything different from what the defendants gave them. Yet in spite of these facts the defendants would try to avoid liability by saying that they never authorized the representations which the agents made. We submit that it is too plain for argument that the defendants themselves are the wrongdoers, and their moral liability is just as great as their legal liability.

Defendants contend that it would be unrighteous to allow the plaintiff to keep this land "worth $75,000.00," and have damages besides. The defendants paid $27,000.00 for the tract, which is exactly $60.00 an acre for the 450 acres of usable land. Although they had been on the land for many years before that time, the defendants did not buy the land until the year 1899. Prior to 1899, the defendants rented the farm from year to year. In 1899 they contracted to buy it for $27,000.00—paying $1,000.00 down, and the balance in installments of $500.00 a year. By the testimony of defendant's witnesses, Wessing, on page 314, Thompson, on page 329, and Zimmerman, on page 335, there was no change in land values in that neighborhood during the interval that elapsed between the time that the defendants bought the land and the time they sold it.

That the human element in this case is very strong for the plaintiff is at once apparent. But it would be even more so if the court could read all the testimony in respect to the various sales of land in that immediate neighborhood, and see just how the prices compared with the sale price of the land involved.

On page 80 of his brief, counsel has inadvertently misstated the testimony of Brown. If the court will read Brown's testimony on page 99 of the transcript it will be seen that he testified that the land "was put up to her and talked to her as $125.00 an acre". This testimony is direct and positive. Now, if the court will look at the testimony of Brown, commencing with the 6th line from the bottom on page 101, it

will see that the defendants themselves told him that they wanted $125.00 an acre for their land; but that he didn't know whether the written contract which they gave the California Colonization Company used the words $125.00 an acre, or $75,000.00 for the land. The witness then goes on to state that his best recollection was that the contract of the *Scheibers* given to the *agents* said $125.00 an acre, but that it might have said $75,000.00—he would not swear to it. That carries us over to page 102 of the transcript, and farther along on that page Brown states that he read the "option" or "contract", and it is perfectly clear that he is talking about the paper that was signed by the Scheiber Brothers authorizing the California Colonization Company to sell the land. He is not talking about the verbal representations that were made to the purchaser.

Counsel continues to argue that the purchaser actually received 600 acres. On page 81 of his brief, counsel states that we must base our conclusions on the survey made by H. H. Jones. He is mistaken. We know that there is an actual shortage of sixty acres by the positive and undisputed testimony of Mulvany, on pages 146 and 148. He testified that "during the past 25 years the river has worked south and covered about 70 acres or more of the land of this particular property". Conceding that the tract originally contained 610 acres, that would leave just 540 acres. Defendant's witness Wessing, on page 311, testified that in 1892 the levee following the bend in the river marked "old Channel" was abandoned, and that they

then ran the levee straight down, so that all the land in the hollow of the bend was abandoned to the swamp. (See map on page 205 of first brief, or page 435 of transcript). By the natural tendency of a stream to straighten its course, the levee on the curve immediately beneath the words "old Channel" was quickly washed away, and the river thereafter spread over that wing-like strip lying to the west of the northwest quarter of Section 13. As we stated in the oral argument, however, we do not believe that the court will draw any distinction between land lying actually beneath the channel of the river and the adjacent swamp land which is conceded to be of no value. Morally, there can be no difference between valueless land and no land.

On page 45 of his brief, counsel states that "they took her agent and confidential adviser over the entire premises and showed him everything". There is no such testimony in the record; and there is absolutely nothing in the record, any place, to justify this statement. Even if it were true that they actually did show Ramos everything it would make no difference, in view of the fact that he was corruptly given money for helping to induce the plaintiff to buy.

On page 81 of his brief, counsel makes another very bad mistake when he says that "plaintiff never sought to have the price per acre reduced, but sought to have the price of the ranch as a whole reduced". On page 176 of the Transcript plaintiff testifies:

> "A. Well, yes, I told them they ought to give it to me for $100.00 an acre because it was wholesale, and they said they could not."

On pages 8, 9, 10, and 11 of his brief, counsel laboriously tries to twist plaintiff's testimony into an argument that defendants told her that the land went over the levee, contending that that circumstance would be sufficient to excuse them for allowing the purchaser to go away with the misconception which they knew she had in reference to the character of the land. Plaintiff testifies on page 206 that defendants told her that the boundary line of the ranch "went right along the green line". The green line was simply the bank of dense green foliage formed by the tree tops on the far side of the levee. Viewed from a distance, it looks like a green bank, or green line. Now, if they said that green line was the boundary, how could they in the same breath say that the land went over on the other side of that green line? Plaintiff's testimony on this point is not as clear as it might be; but if the court will look at page 206 it will see that what the plaintiff intended to convey was that they told her that the boundary of the ranch went along the levee to a point near a white building, and thence to the right along a fence to some trees, and from those trees over to "the grove". At another place in the record her testimony reads "across those trees", instead of "across *from* those trees". When she used the word *"trees",* the plaintiff was referring to some trees at the easterly end of the tract, and not to the trees behind the levee. All we ask in this regard is that the court read the testimony of the plaintiff on page 206 as well as that portion to which the quotations of counsel are confined, and it will be at once apparent

that the plaintiff's testimony conforms to the allegations of the complaint, and that there is nothing in her testimony that can be made the basis of an argument that they told her that the land extended over on to the other side of the levee.

Another point which the defendants have seized upon to excuse them for not explaining the true character of the land to the plaintiff is the testimony of the witness Dike, on page 262, to the effect that he asked the plaintiff if she would like to walk up to the top of the levee. We would like to ask the question at this point "What is there in that testimony, or in any testimony in the record, to show that it was stated to plaintiff that the land on the far side of the levee belonged to the tract they were trying to sell her? Let us now see what the plaintiff herself says about their asking her to go up on the levee. On page 207 the plaintiff testifies: "Mr. Dike asked, in passing, would I walk up and look around the country, and I said no, I wanted to go to the ranch." Was there anything in the invitation of Dike to go up on the levee which can excuse the defendants for not telling the puchaser that 25 per cent of their land was worthless? Everything in the record leads us to the belief that the agents themselves were entirely ignorant of the large percentage of land outside of the levee. Dike's invitation to go upon the levee was simply a suggestion to the plaintiff that she could get a good view of the country from the elevated position on the levee. Dike's invitation to the plaintiff to go upon the levee can not possibly be contorted into an effort on his part to

show plaintiff any objectionable feature of the land he was at the time trying to sell her. Does it stand to reason, that if Dike knew about a particularly bad portion or feature of the land, he would lead the prospective purchaser to that particular point upon their first advent to the land? But suppose that Dike, in asking the plaintiff if she would like to step up onto the levee, really did ask her to step up there so that she could first see a particularly bad feature of the land—didn't the plaintiff refuse to climb up the levee, and didn't she state to him that her ankle was too sore to climb that steep embankment? If Dike's purpose in asking plaintiff onto the levee had been to make her familiar with the worthless condition of any portion of the land, would he not, and should he not, have then and there immediately stated to her that twenty-five per cent of the 600 acres which they had told her about could not possibly be used for any agricultural purpose? Dike took the plaintiff to the land on Thursday, September 21st. The following Saturday night, September 23d, they held a protracted conference in Sacramento in reference to the prospective sale. At that meeting there were present the three agents, Crane, Dike and Brown, and Ramos and the plaintiff. With the exception of Ramos, who was dead, every one of the parties at that meeting testified at the trial; and each one testified that it was there represented to the plaintiff that the tract was 600 acres of first class alfalfa land. If the plaintiff had been advised of any worthless land in the tract, or any land which she would have reason to believe

was not good, would the circumstance not have been discussed at that meeting? At that meeting there was not a thing said in reference to any land not being as good as some of the other land, and nothing said about any shortage, and nothing said about any land outside the levee. On page 99 Brown says: "There was nothing said about some of the land not being as good as some of the rest of the land." On page 261 Dike says: "We pointed the boundary line by fences, levee and river boundary." In as much as the river could not be seen from the east side of the levee, and as the plaintiff thought that the river was close up against the other side of the levee, they must have given her the levee as the northwestern boundary. On page 263 Dike says that, in pointing out the boundaries to the plaintiff, they mentioned the river bank as the west boundary. There can be no question that by the word "bank" he meant the high embankment formed by the levee. The Court can take judicial notice that a levee at such a place is a high embankment anywhere from ten to twenty feet in elevation, and in some places higher. The actual water's edge could not be seen from the east side of the levee, and moreover there is no bank to the actual edge of the river. An inspection of the photograph exhibits will show the water's edge as having a very close resemblance to a sand or gravel beach. In this connection we must again refer to the testimony of Morris Scheiber on page 359 of the transcript, viz.: "I says, 'Over to the old Feather River.' Q. Do you know whether she understood at the time or not that the river was up against the levee, or

whether it was away back from the levee? A. I don't know. Q. You don't know? A. No; she did not say anything." By the testimony of the plaintiff on pages 206 and 207, she thought that the river lay immediately behind the levee. We think it is as plain as A B C that when they had the woman there at the land, both the agents and the owners gave her the levee as one of the boundaries of the tract.

While we think about it we want to call attention to two points in the testimony of Brown. On page 138 Brown testifies that the plaintiff told them that she had no experience in reference to land. On pages 139 and 140 he testifies that the land was represented to her as being sub-irrigated.

The stubborn fact remains that plaintiff never knew that the tract extended to the west side of the levee. It was the duty of the defendants to make her understand, not simply that there was land on the other side of the levee, but that 25% of the so-called 600 acres was absolutely useless. The purchaser was entirely without experience, and they all knew it. Moreover, at that time, the plaintiff had no idea of buying that land; as Ramos had, of course, not yet started to work on her. At that time Ramos had never before seen the land himself, and of course he could not consistently urge her to buy anything that he had never himself seen. When we recall that she had not intended to invest more than $6000.00 in the beginning, we readily perceive that she did not begin to think seriously about buying this large tract until after Ramos had got her off alone and commenced to

tell her why she should buy the land. Under all the facts of this case, the situation is identically the same as though the plaintiff had never seen the land before signing to buy it.

We believe that the action of the court in this case, as it is in all cases, will be influenced largely by the purely moral status of the case. We have shown the most serious and palpable errors in the ruling of the trial court; nevertheless, if this court should believe that the plaintiff in error, after her discovery of the true character of the land, was really offered all that she had paid for the land, and that she refused to take it, the court would be very loath to interfere with the judgment, errors of law notwithstanding. Silva, a personal friend of the defendants (and, by the way, all of defendants' valuation witnesses were their personal friends), comes into court and says that he has farmed this particular land, and that he is thoroughly familiar with that land and the neighboring land, and with land values in that neighborhood. Silva states that he is worth the money, and that he offered the plaintiff $75,000.00 for the land. Plaintiff, on page 222, vehemently denies that Silva ever made any such offer. Which of the two witnesses is testifying falsely? Let us look at the map on page 205 of the first brief, or on 435 of the transcript. We notice the land of W. H. Saylor, immediately southwest of the good land of the Garwood tract. Defendants' witness John Borgman, on page 325, says: "The Saylor land is *not quite* as good as the best land on the Schreiber ranch." Now virtually all of the witnesses on both sides say

that the good land on the Garwood place is twice as valuable as the poor land at the lower end of the tract. From this we see that the 128 acres of the Saylor farm is, on the average, much better land than the 450 acres of usable land on the Garwood tract. On page 404 Saylor himself says that he bought that comparatively small tract of 128 acres in 1909 or 1910 for 100 dollars an acre, and that the land had been on the market a long time at that price. We thus see that $100.00 an acre would have been a high price for the 450 acres of the Scheiber land. Now here comes Silva, a man of means and business sagacity and thrift, and thorough acquaintance with land conditions and values in that district, and swears under oath that he would have paid $125.00 an acre for that 450 acres of usable land of the Scheibers, and along with that he would have given $125.00 an acre for the seventy acres under the Feather River, and also $125.00 an acre for the ninety acres of admittedly worthless swamp land. We submit that, in the light of these facts, Silva's testimony is too ridiculous for serious consideration. The reasoning in reference to the Saylor land applies also to the Borgman land. The same reasoning applies to the land marked "M. Meiss, Drescher and J. B. Thompson" (formerly the Valley place). (See testimony of defendants' witness Wessing.) The same reasoning applies to the land marked Gilmore at the bottom of the map. These statements may all be verified by the testimony of the defendants' valuation witnesses. The same reasoning applies to the Redfield farm (marked

"Scheiber Bros."), paralleling the good land of the Garwood tract on the northeast. (See testimony of Dave Redfield and Mulvany, and also defendants' valuation witnesses.)

Counsel states that we did not use our own map because of its inaccuracy. This is not true. We have used his map because it shows the surrounding farms, and our map does not.

Counsel asks the question, "Why was not the substance of the amendment to the complaint embodied in the complaint as it was originally filed?" The answer to that question is simply that it was because of a misconception on the part of plaintiff's counsel in the true theory of the case. Upon her discovery of the shortage in the land, plaintiff commenced an action for rescission and damages in the State Court in Sutter County; but being fearful of local prejudice she thereafter withdrew that action, and thereafter commenced her action in the United States Court. At the time plaintiff's present counsel commenced the action in the Federal Court, so long a time had elapsed since the sale of the land that he did not think a rescission obtainable, and for that reason framed his action simply for an abatement in the purchase price. However, after the trial court allowed the defendants to put in testimony of witnesses that the land in its entirety was worth all that plaintiff paid for it, we filed with the Clerk of the District Court an offer in writing to the effect that in the event of a judgment for the plaintiff the defendants could take back the land in lieu of paying the judgment. It should be remem-

bered that the plaintiff, before commencing her action in the State Court, had offered the land back to the defendants, and the defendants refused to take back the land. The written refusal of defendants to rescind is in evidence among the exhibits in this case.

Respectfully submitted,

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